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88-1878

No. ____,

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

JAMES SAFFLE, WARDEN,
OKLAHOMA STATE PENITENTIARY,
GARY MAYNARD, DIRECTOR
OKLAHOMA DEPARTMENT OF
CORRECTIONS,
ROBERT H. HENRY,
ATTORNEY GENERAL OF
OKLAHOMA,

Petitioners,

vs.

CHARLES WILLIAM DAVIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether in the sentencing phase of a capital murder prosecution the Eighth

Amendment prohibits an "anti-sympathy" jury instruction which states, in pertinent part:

> You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence.

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The Attorney General of Oklahoma, Robert H. Henry, on behalf of the Warden of the Oklahoma State Penitentiary, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals (Appendix A, submitted herewith) is reported as Davis v. Maynard, ___ F.2d _____ (10th Cir. March 14, 1989). The opinion of the District Court (Appendix B, submitted herewith) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, submitted herewith) was entered on March 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

Respondent, hereinafter Defendant, was convicted of murdering his wife's brother and another man in an incident in which he also wounded his wife and another of her brothers. Defendant was sentenced to die in the District Court of Oklahoma County, Oklahoma. After

exhausting his state remedies, Defendant sought a writ of habeas corpus in the United States District Court for the Western District of Oklahoma under 28 U.S.C. § 2254. After the district court denied the writ the Defendant appealed to the United States Court of Appeals for the Tenth Circuit. A three judge panel of that court affirmed the district court's denial of habeas relief, but reversed with respect to the district court's denial of all further relief, specifically declaring the death sentence invalid due to: 1) error under the rule of Maynard v. Cartwright, 108 S.Ct. 1853 (1988)[1] and 2) error under

[1] The Tenth Circuit left it to the state court to address in the first instance whether the deaths in the instant case could be categorized under a restricted application of the "especially heinous, atrocious or cruel" aggravating circumstance or whether any

the rule of Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc) by finding sentencing phase Jury Instruction No. 13 (the "anti-sympathy" instruction) violated the Defendant's rights under the Eighth Amendment. Davis v. Maynard, App. A at 46-49.

Such a finding by the Tenth Circuit reversed the decision of the district court that the "instruction does not preclude consideration of any evidence regarding any aspect of the petitioner's character or record or any of the circumstances of the crimes offered by the petitioner as a basis for a sentence of less than death." App. B at 13.

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error from findings of such circumstance could be construed as harmless. App. A at 53-54. Thus, that issue is not brought to this Court for review at this time.

During the sentencing proceedings at Defendant's trial, Defendant himself testified of his love for his wife as well as introduced a tape-recorded statement in which he expressed his feelings for her. Other witnesses testified regarding their observations of Defendant's love for his wife. Additionally, Defendant's probation officer testified. The trial court did not exclude any mitigating evidence offered by the Defendant during the sentencing proceedings.

With regard to mitigating circumstances, Instruction No. 6 in the sentencing phase stated:

> You are instructed that mitigating circumstances are not specifically enumerated in the statutes of this State, but the law of this State sets up certain minimum mitigating circumstances you shall follow as guidelines in determining which sentence you

impose in this case. You shall consider any or all of these minimum mitigating circumstances which you find apply to the facts and circumstances of this case. You are not limited in your consideration to these minimum mitigating circumstances. You may consider any additional mitigating circumstances, if any, you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury to determine.

The following things, if true, could be considered as provided by law:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

4. The defendant acted under duress or under the domination of another person;

5. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication;

6. The age of the defendant at the time of the crime.

Instruction No. 13 in the sentencing phase stated in part:

> You should not allow sympathy, sentiment or prejudice to affect you in reaching your decision. You should avoid any influence of passion, prejudice or any other arbitrary factor when imposing sentence. You should do your duties as jurors as you sworn [sic] you would do.

During the closing argument the prosecutor discussed that the jury must consider the four aggravating circumstances alleged and determine that at least one existed to consider the death penalty. As well the prosecutor

emphasized that the jury must consider the mitigating circumstances presented and determine whether they outweigh mitigrating circumstances (Tr. 884-87). The chief prosecutor mentioned that the jury should not let sympathy affect its judgment in order to reach an impartial decision. (Tr. 896, 908). As well he informed the jury that "you can consider anything in mitigation" and discussed mitigating circumstances enumerated in Instruction No. 6 (Tr. 904-906).

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the application of the Eighth Amendment to capital murder sentencing proceedings. The Court below held unconstitutional the "anti-sympathy" jury instruction because it

believed the instruction created an impermissible risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision, even though both the trial court and the prosecutor had instructed the jury that it must consider the mitigating evidence.

In reaching its decision the court below relied upon its pronouncement in Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc). Importantly this Court on April 24, 1989, granted the State of Oklahoma's Petition for a Writ of Certiorari in that case. Saffle v. Parks, No. 88-1264. The conclusion of the Tenth Circuit in both the instant case and Parks v. Brown, 860 F.2d at 1545 cannot be reconciled with this Court's opinion in California v. Brown,

479 U.S. 538 (1987). Further, the opinions of the Tenth Circuit are in conflict with the decision of the Fifth Circuit in Byrne v. Butler, 847 F.2d 1135 (5th Cir. 1988), with the opinion of the Ohio Supreme Court in State v. Steffen, 509 N.E.2d 383, 396 (Ohio 1987), cert. denied, 108 S.Ct. 1089 (1988), and with the decision of the Supreme Court of Louisiana in Louisiana v. Copeland, 530 So.2d 526 (La. 1988).

The Constitution does not require sympathy in capital sentencing.

In California v. Brown, 479 U.S. 538 (1987) the Court summarized the Eighth Amendment law of capital punishment as requiring, first, death penalty statutes be structured so as to prevent the penalty from being administered in and unpredictable fashion, and second, the

court stated that a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death. Id., 479 U.S. at 541. To these two Eighth Amendment prerequisites to a valid death sentence a narrow majority of the Tenth Circuit, speaking through Judge Ebel, has added a right to appeal for mercy, humane treatment, compassion, and sympathy. 860 F.2d at 1556. While this is not a case in which the defense was precluded from introducing mitigating evidence or the jury was precluded from considering that evidence, the Tenth Circuit struck down the anti-sympathy instruction because it

found that instruction created an impermissible risk that the jury did not fully consider the Defendant's mitigating evidence in making its sentencing decision. App. A at 48-49. The court below additionally stated that evidence-based sympathy is a valid sentencing consideration. App. A at 47-48. Thus, the court below entered the realm of the mental and emotional processes of jurors to create a constitutional requirement that sentencing jurors not merely consider mitigating factors but "fully consider" them with a sympathetic attitude.

Although not articulated by the majority opinion in Parks v. Brown, 860 F.2d at 1545, Judge McKay's opinion in that case, concurring and dissenting in part, articulates what may be an

underlying premise of the majority's opinion. Judge McKay called this the Parks crime an "ordinary murder case" in which the imposition of the death penalty strongly suggests the jury conducted its task improperly. Opinion of McKay, J., concurring in part and dissenting in part, 860 F.2d at 1562. The Parks majority may have believed that "something" had to go wrong to result in the death penalty for an "ordinary murder" and that "something" was a failure of the jury to adequately consider the defendant's case in mitigation. Thus, resentencing was necessary, even though the trial court in no way impeded the Defendant's case in mitigation.

In the present case the Tenth Circuit simply cited to its Parks en banc

opinion, despite the fact that the instruction given in this case did not specifically admonish the jury to avoid any influence of sympathy when imposing sentence. We believe this special scrutiny of "ordinary murders" presents an extreme danger that appellate federal courts will substitute their views of "ordinary murder" cases for those of the jurors who hear the case, even in the absence of interference with the case in mitigation. Moreover, Petitioners contend that the murders of Dennis McLaughlin and Robert Jones were not ordinary, particularly as defendant had been convicted previously of murder.

We believe the opinion of the court below cannot be squared with the requirement of California v. Brown, supra, that the proper focus is on what

a reasonable juror could have understood the charge to mean. Id., 479 U.S. at 541. To determine how a reasonable juror could interpret an instruction, we must focus initially on the specific language challenged and, if that language fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. The Tenth Circuit in Parks v. Brown, 860 F.2d at 1553-54, ignored almost all of this court's opinion in Brown, and distinguished the jury instruction in Parks v. Brown, id. from the California instruction upheld in Brown because the latter instruction prohibited "mere" sympathy, while the instruction in Parks advises jurors to avoid "any influence of sympathy,

sentiment, passion, prejudice" or other arbitrary factors. Id., at 1552. We believe this distinction is one which would escape a lay juror. This is particularly true in the instant case where sympathy is not enumerated in the "anti-sympathy" instruction as one of the emotions to avoid in sentencing.

Instruction No. 6 in the sentencing phase, set out above, advised the jury in no uncertain terms that it must consider not only certain minimum mitigating circumstances but that jurors may consider any other or additional mitigating circumstances, if any, that they found from the evidence to exist in the case. The prosecutor further informed the jurors of their obligation to consider the mitigating evidence and touched on each of the specific

"minimum" mitigating circumstances in turn and told the jurors that they could consider anything else that they want to, to mitigate the penalty of death and the term of life (Tr. 904-06). Thus, the jurors were informed by both the court and the prosecutor to consider the Defendant's case in mitigation but to do so impartially, conscientiously, and faithfully under their oaths and to return such verdict as the evidence warrants when measured by these instructions.

In light of the evidence, argument, and instructions on mitigating evidence, no reasonable juror would interpret the admonition to avoid the influence of passion and prejudice as a secret code designed to denigrate the Defendant's case in mitigation. Rather, as was the

case in Brown, a reasonable juror would consider sympathy, sentiment, passion, and prejudice to be no more than a catalogue of the kind of factors that could improperly influence their decision to vote for or against the death penalty. Id., 479 U.S. at 543. The trial court instructed the jury against passion, prejudice, or any other arbitrary factor when imposing sentence and further informed the jurors that they should discharge their duty impartially, conscientiously, and faithfully under their oaths. Thus, the instruction directed the jurors away from extraneous emotional factors and toward an impartial and conscientious performance of their duties based upon the evidence. As in Brown, the challenged instruction serves the useful

purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors. Also, the instruction limits the jury's consideration to matters introduced in evidence before it fostering the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case. Id., 479 U.S. at 543. Likewise, by limiting the jury's sentencing consideration to record evidence, the instruction also insures the availability of meaningful judicial review which is another safeguard that improves the reliability of the sentencing process. Id., 479 U.S. at 543. Finally, as in Brown, an instruction toward an impartial and

conscientious verdict and away from emotion is far more likely to benefit a capital murder defendant than to harm him. Id., 479 U.S. at 543.

At his trial the Defendant received individualized consideration of his mitigating circumstances and was no way restricted in his ability to introduce mitigating evidence or to argue mitigation to the jury. Yet the court below has now imposed as an Eighth Amendment requirement the necessity of the jury to not only consider the mitigating evidence but to "fully consider" the mitigating evidence with an attitude of sympathy. Yet the court below points to no evidence in the record, or plausible reason to believe, that the jury actually did not "fully consider" Defendant's mitigating

evidence. Short of deposing the jury such evidence would be impossible to find. Thus, the court below justifies its ruling by the impermissible risk the jury did not "fully consider" the mitigating evidence. This heightened requirement of full consideration by a sympathetic jury is a step backwards from this Court's long-standing commitment that capital sentencing be, and appear to be, based on reason rather than caprice or emotion. As Judge Anderson correctly stated in writing for himself and the three other dissenting judges in Parks v. Brown, 860 F.2d at 1569-70:

> The requirement that sentencing decisions must be rational has been emphasized over and over again by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972).

In Gardner v. Florida, 430 U.S. 349, 358 (1976), the Court stated: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." That standard has been referred to repeatedly by the Court in its later decisions. Sumner v. Shuman, 107 S.Ct. 2716, 2723, n.5 (1987) ("sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" quoting California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concur- ring)); Booth v. Maryland, 107 S.Ct. at 2536 ("[A]ny decision to impose the death sentence must 'be, and appear to be, based on reason rather than caprice or emotion.'", quoting Gardner v. Florida, 430 U.S. at 358; "reasoned decision making" required in capital cases); McCleskey v. Kemp, 107 S.Ct. 1756, 1789 (1987) ("[W]e have demanded a uniquely high degree of rationality in imposing the death penalty." (Brennan, dissenting)); Caldwell v. Mississippi, 472 U.S. 320 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise

of sentencing discretion." Id. at 329; "[T]his Court has gone to extraordinary measures to insure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Id. at 329, n.2, quoting Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); Pulley v. Harris, 465 U.S. 37, 53 (1984) (upholding the constitutionality of a state statute which guaranteed that the jury's discretion will be guided and its consideration "deliberate"); California v. Ramos, 463 U.S. 992, 1018-21 (1983) (Marshall, dissenting) (capital punishment decisions must be "rational," "meaningful," "principled," and "reliable"); Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (death sentence must be based on reason rather than caprice or emotion, quoting Gardner v. Florida, 430 U.S. at 358); Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (reason rather than caprice or emotion required); Gregg v. Georgia, 428 U.S. 153, 190 (1976) ("reasoned determination" by a jury); Jurek v. Texas, 428 U.S. 262, 274 (1976) (Texas procedure "guides and focuses the jury's objective consideration of the particularized circumstances of

> the individual offense and the individual offender.") (emphasis supplied); Proffitt v. Florida, 428 U.S. 242, 259 (1975) ("[T]here shall be an informed, focused, guided, and objective inquiry into the question whether [a convicted person] should be sentenced to death.").

Judge Anderson and the dissenting judges in Parks agreed with Justice O'Connor that the sentencing posed at the penalty stage should reflect a reasoned moral response to the Defendant's background, character, and crime rather than mere sympathy or emotion Id., at 1569. We likewise agree that the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the guilt of the defendant and not an emotional response to the mitigating evidence. Id. As we have demonstrated, nothing in these sentencing proceedings

mislead the jury into believing that it should not consider the Defendant's case in mitigation. Quite the contrary, even the prosecutor reinforced the jury's duty to consider the evidence in mitigation. The Defendant was sentenced in a proceeding which guided and directed the jury sentencing discretion and which he could submit to the jury his case in mitigation without interference by the court. The Constitution requires no more.

The court in Parks v. Brown misapplied Mills v. Maryland, 108 S.Ct. 1860 (1988). In Mills the verdict form was ambiguous and could reasonably be read in two ways, one of which could result in a verdict of death when jurors found mitigating circumstances were present but did not agree unanimously on

which mitigating factors were present in the case. Id., 100 L.Ed.2d at 394. This Court found a substantial possibility that the verdict rested on the improper ground and remanded for resentencing. Id., 100 L.Ed.2d at 395-96. The Tenth Circuit applied this "substantial possibility" language to an entirely different circumstance and remanded for resentencing because the jury verdict in this case may have rested on the "improper" (i.e. non-sympathetic) ground Parks v. Brown, 860 F.2d at 1557. Unlike in Mills, the juries in Parks and in the present case were not in danger of being tricked into disregarding each Defendant's case in mitigation. The admonition against passion, and prejudice, and in favor of an impartial and conscientious discharge

of their duty as jurors could not be construed by a reasonable juror as an instruction to disregard the case in mitigation. Thus, the instruction passes constitutional muster and the court below erred in striking it down.

Even if Instruction No. 13 were unconstitutional, a proposition we obviously contest, following the second stage of this Court's formula from Brown, we must review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. Id., 479 U.S. at 541. Instruction No. 6 unquestionably did correctly instruct the jury that they must consider not only the six listed "minimum" mitigating circumstances but any other or additional mitigating circumstances they might find from the

evidence to exist in the case. Thus, the Defendant received the "constitutionally indispensable" consideration of his mitigating evidence during the sentencing. Id., 479 U.S. at 541. The Defendant received the prerequisites the Eighth Amendment imposes upon a valid death sentence. The court below departed from this Court's pronouncement in California v. Brown, supra, and imposed yet a third prerequisite based upon the sheer speculation that the jury may not have "fully considered" the Defendant's case in mitigation. We respectfully ask this Court to grant our Petition for Writ of Certiorari and review and reverse the decision of the court below upon determination of the similar issue in Saffle v. Parks, No. 88-1264.

The decision of the court below will disrupt the administration of criminal justice.

In striking down the "anti-sympathy" instruction, an instruction which even-handedly prohibited passion or prejudice either for or against the Defendant, the court below has sent a message to the defense bar that appeals to sympathy on behalf of their Defendants are not only permissible but may be constitutionally required to be heard by trial courts. If the opinion of the court below is upheld, trial courts will be unable to restrict emotional appeals on behalf of Defendants for fear of committing constitutionally reversible error. Two further results, neither of which are desirable, may obtain. First, prosecutors may feel they have a license to make pleas for sympathy for victims

or families, at least so long as that sympathy is "tethered" to the evidence of the crime. Secondly, prosecutors may be foreclosed from making a countervailing emotional plea under the accusation that sympathy is the exclusive province of the defendant and sentiment, passion, and prejudice are constitutionally improper. In either event, capital sentencing will sink into the realm of the emotional rather than relying upon the objective factors which have characterized this Court's opinions on capital sentencing.

Further, because this instruction, or instructions like it, are common in capital sentencing in Oklahoma, the opinion of the court below will have an impact going far beyond the specific cases of Robyn Parks and Charles William

Davis. The already protracted process of constitutional litigation will be further delayed if the opinions of Parks v. Brown, 860 F.2d at 1545, and its progeny stands. Many condemned murderers may ultimately be released because their jurors may not have "fully considered" their cases in mitigation with the proper sympathetic frame of mind. To a general public already bewildered by the inability of the courts to do justice in capital cases such a result will only make worse the growing disrespect of the public for our courts.

The decision of the court below creates a split in the circuits.

In Byrne v. Butler, 847 F.2d 1135, 1139-40 (5th Cir. 1988), the Fifth Circuit, by adopting the reasoning of

the district court, came to precisely the opposite conclusion as did the court below in analyzing an "anti-sympathy" instruction. Contrary to the Tenth Circuit, the Fifth Circuit held that this Court in California v. Brown, supra, did not hold that the qualifier "mere" was necessary to avoid a constitutional violation. Byrne, supra, 847 F.2d at 1139. The court in Byrne, relying on California v. Brown, found that the trial court's admonition to the jury not to be influenced by sympathy, passion, prejudice or public opinion did not limit the jury consideration of mitigating circumstances. Id., 847 F.2d at 1137, 1139-40.

Further, the Ohio Supreme Court has rejected a challenge to a jury instruction to disregard feelings of

sympathy in penalty phase deliberations, relying in part on California v. Brown, supra. State v. Steffen, 509 N.E.2d 383, 396, cert. denied 108 S.Ct. 1089 (1988). The Court in Steffen, also relied on its earlier cases, one of which, State v. Scott, 497 N.E.2d 55, 68 (Ohio 1986), cert. denied, 107 S.Ct. 1386 (1987) which upheld an "anti-sympathy" instruction which stated:

> You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

497 N.E.2d at 68. Such instructions are no less forceful than the Oklahoma instruction invalidated by the Tenth Circuit. Yet, despite the absence of the talismanic word "mere" modifying "sympathy" the Ohio Supreme Court has found they pass constitutional muster.

The opinion of the Fifth Circuit in Byrne, by adopting the district court opinion, also relied upon an opinion of the Louisiana Supreme Court, State v. Copeland, 530 So.2d 526, 537 (La. 1988). Byrne, supra, 847 F.2d at 1140. The Louisiana Supreme Court in Copeland, dealt with a guilt phase instruction which stated that the jury was not to be influenced by sympathy, passion, prejudice, or public opinion and was to reach a just verdict. The Court stated that a similar instruction, if given

during the penalty phase, does not unduly prejudice a defendant relying, on two of its earlier opinions and this Court's opinion in California v. Brown. Thus, while the Louisiana Supreme Court in Copeland did not face a sentencing phase instruction it indicated clearly that it would find such an instruction constitutionally permissible. Copeland, supra, 530 So.2d at 537.

Writing for the dissent in Parks v. Brown, 860 F.2d at 1570, Judge Anderson stated that the majority's disagreement with the Fifth Circuit in Byrne goes farther than splitting the circuits and represents an extreme position lacking any support at all in existing cases. The circuits are clearly split and the Fifth Circuit's approach is the correct one. The Tenth Circuit California v.

Brown, supra, an opinion approving an anti-sympathy instruction, and turned it into an opinion compelling the conclusion that the present instruction is unconstitutional despite the absence of the word "sympathy" as an emotion to be avoided in imposing sentence and because of the absence of the word "mere" to modify sympathy as an emotion to be given no effect when reaching the jury's decision. We ask this Court to grant a Writ of Certiorari as it has in Saffle v. Parks, No. 88-1264, to resolve this split in the circuits between the Tenth and Fifth Circuits in favor of the position adopted by the Fifth Circuit.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, particularly as this Court recently granted certiorari in the case of Saffle v. Parks, No. 88-1264.

Respectfully submitted,

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